In the Supreme Court of the United States

OCTOBER TERM, 1940

No.....

NGIM AH OY,
Petitioner,

vs.

EDWARD L. HAFF, as District Director, United States Immigration and Naturalization Service, Port of San Francisco, California,
Respondent.

Brief in Support of Petition for Writ of Certiorari

I.

THE OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 76) is reported as "Ngim Ah Oy vs. Edward L. Haff, as District Director, United

States Immigration and Naturalization Service," in 112 Fed. (2d) 607. The District Court did not file an opinion.

II.

JURISDICTION

1. The date of the judgment to be reviewed is June 11, 1940 (R. 81-82). The petition for rehearing was denied on June 29, 1940 (R. 82).

2. The jurisdiction of this Honorable Court is invoked under the provisions of Section (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Statutes 938, Title 28 U. S. C. A., Section 347 (a).

III.

STATEMENT OF THE CASE

The statement of the matter involved set forth in the petition for writ of certiorari (supra pp. 1, 2, 3) is believed sufficient for a discussion of the assignments of error and questions presented and that statement is therefore adopted herein in the interest of brevity.

IV.

SPECIFICATION OF ERRORS

1. That petitioner was denied due process of law because she was not accorded a fair preliminary hear-

ing, or any at all, before being held for a Board of Special Inquiry.

2. That petitioner was denied due process of law because she was not accorded a fair preliminary hearing, or any at all, before two immigrant inspectors before being held for a Board of Special Inquiry.

3. That the Circuit Court of Appeals erred in not holding that the Secretary of Labor on appeal acted unfairly and unreasonably against the petitioner in finding that there was evidence that petitioner's witness, Whoe Tong, had been guilty of suggesting the taking of a bribe by an immigrant inspector in a previous immigration case and that by reason thereof his credibility as a witness was thereby impeached.

4. That the court erred in holding that the Secretary of Labor's Board of Review had corrected the error committed by the Board of Special Inquiry in not calling certain ex parte records to the attention of petitioner's witness, Whoe Tong (Woo Tong), so that said witness would have the opportunity of denying prejudicial implications contained therein against his credibility as a witness.

5. That the lower court erred in not holding that the judgment of the Secretary of Labor on appeal, in affirming the exclusion decision of the Board of Special Inquiry, was based, in part, on grounds not relied upon by the Board of Special Inquiry.

6. That the Secretary of Labor's Board of Review abdicated their functions as an appellate agency by refusing to pass upon and determine whether or not

the Board of Special Inquiry had found on substantial or sufficient evidence that petitioner's vital witness, Whoe Tong, had been successfully impeached because of the findings of the Board of Special Inquiry that he has "been repeatedly guilty of perjury and subornation of perjury in immigration proceedings."

7. That the lower court erred in not finding that the Secretary of Labor, through her Board of Review, had made no finding that petitioner was not a citizen of the United States or that she was an alien ineligible to admission to the United States.

V.

ARGUMENT

1. Petitioner respectfully submits that the decision below to the effect that a proper preliminary examination required by the Immigration Act of 1917 may be conducted by one immigrant inspector, is an erroneous interpretation of the statute. Petitioner contends that she was not accorded a proper preliminary examination before, and by, *two* immigrant inspectors before being "duly" held for examination by a Board of Special Inquiry. This is the first time that the interpretation of this clause of the statute has ever been made, either by this Honorable Court or any of the Honorable Circuit Courts of Appeal, and insofar as we are advised has never been decided by any of the various District Courts of the United States. Among other things, Section 17 of the Immigration

Act of 1917 (8 USCA 152) states, in explicit language, that:

> "All aliens arriving at ports of the United States shall be examined by at least two immigrant inspectors at the discretion of the Secretary of Labor and under such regulations as he may prescribe."

Section 17 of the Immigration Act of 1917 (8 USCA 153), which is controlling here, reads as follows:

> "Such boards shall have *authority* to determine whether an alien who has been *duly* held shall be allowed to land or shall be deported." (Emphasis ours.)

Thus it will be seen that, by the express command of the statute, a preliminary examination must be held before, and the alleged alien *examined* by, *at least two* immigrant inspectors (*more* than two may be required in the discretion of the Secretary of Labor—but not *less* than two), *precedently* to a "due" holding for examination by a Board of Special Inquiry.

A proper preliminary examination by at least two immigrant inspectors antecedent to a "due" holding for a Board of Special Inquiry is imperatively required by the express language of the Immigration Act of 1917, as a *condition precedent*. A proper preliminary examination is *jurisdictional*. Without it the Board of Special Inquiry has no authority or power to hear and determine whether the alien is

entitled to land or is to be excluded from admission. The statute expressly states that the Board of Special Inquiry has *authority* to examine and investigate after a "due" holding. If the alleged alien has not been examined by at least two immigrant inspectors precedently to the *holding,* or, putting it in another way, if the inspectors, by reason of failure to give the alien notice of the time and place of the preliminary hearing so that he may, if he so desires, produce such evidence which may show clearly and beyond a doubt that he is entitled to land, then the so-called "due holding" is but a delusive formality, *coram non judice* and void. Such was the situation in the instant case.

The Board of Special Inquiry, the same as all adjuncts to administrative agencies, is pursuing *a special and limited jurisdiction* and the statute is the measure and mode of its power. The Department of Labor must be classed with other bodies exercising special and limited statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of their *jurisdiction,* but the facts necessary to confer it must *affirmatively* appear, *and the exercise of jurisdiction does not imply a previous ascertainment of those facts.* If express power is not given by the statute in so many words to the administrative agency, it cannot be implied. All statutes relating to and regulating immigration, including the exclusion and deportation of aliens, are special and limited in their scope. An administrative agency, unknown to the common law, and erected by legislative statutes, must strictly follow, and keep within the con-

fines of, the statutory scheme. The procedural machinery set up by the statute is *jurisdictional* in the absolute sense, and, as often expressed by the courts, "the statute is the measure and mode of the agency's power." Therefore, a proper preliminary examination before holding an alien for examination by a Board of Special Inquiry is a condition precedent and *jurisdictional.*

Section 16 of the Immigration Act of February 5, 1917 (8 USCA 152), states, in reference to the preliminary investigation, as follows:

> "Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by the board of special inquiry * * *"

Section 16 of the same Act (8 USCA 152) states further with reference to a preliminary examination, as follows:

> "The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation."

Section 15 of the Immigration Act of 1917 (8 USCA 151) states, in part, as follows:

> "That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the

duty of the proper immigration officials to go or to send competent assistants to the vessel and there inspect all such aliens, or said immigration officials may order a temporary removal of such aliens for *examination* at a *designated time and place,* but such temporary removal shall not be considered a landing * * *" (Emphasis ours.)

The proper procedure regarding alien applicants for admission to the United States is clearly stated by Judge Learned Hand, speaking for the United States Circuit Court of Appeals for the Second Circuit in the case of *U. S. ex rel. Yee Loy Gee vs. Pierce,* 289 Fed. 233. The able Judge there said:

"* * * The procedure of exclusion is laid down in sections 15, 16, and 17 of the Immigration Act (Comp. St. Secs. 4289¼hh-4289¼ii). Under sections 15 and 16 it is provided that immigration inspectors shall board all incoming vessels and inspect immigrants; they may detain for examination any whom they suspect of being ineligible. Any alien, who after such an examination shall not appear to the examining inspector beyond doubt to be eligible for entrance, shall be detained for examination by a board of special inquiry. Section 17 prescribes that 'such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported.'"

As declared by the learned judge in the immediately above referred to case, the first step required by the procedural norms is for an immigration in-

spector to board the incoming vessel and there *inspect* the alleged alien; secondly, if the immigrant inspector *suspects* that the alleged alien of being ineligible he shall detain the alleged alien for a preliminary examination at a *specified time and place;* thirdly, if *after* the *preliminary examination* it shall not appear beyond doubt that the alleged alien is eligible for admission, said alleged alien shall be held for examination by a Board of Special Inquiry. In the case of *Yee Loy Gee vs. Pierce,* supra, the Court of Appeals did not determine or even mention the question, now presented, regarding the contention that an alleged alien who is detained for a preliminary examination must be examined by *at least two* immigrant inspectors. This point was not raised.

Regarding the proper interpretation of the Immigration Act of 1917 respecting whether or not it is necessary to have *at least two* immigrant inspectors participate in the examination of every alleged alien who, after inspection, is suspected of being ineligible to admission, a careful examination of the entire Act clearly reveals the congressional intent, we believe. That intent is that every alleged alien must be preliminarily examined by "at least two inspectors." That this is the correct construction of the statute would seem to be clear when it is read in conjunction with Section 16 of the Immigration Act of 1917 (8 USCA Sec. 152), and when also considered with reference to the effect which would follow if the construction adopted by the Honorable Ninth Circuit

Court of Appeals is upheld. Section 16, in part, reads as follows:

> "The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation."

This last section of the statute makes it obvious that *at least two* immigrant inspectors must examine the alien seeking admission. Otherwise, it would not make sense. Unless two immigrant inspectors participated in the examination, how could one challenge the other and thereby have the alien taken before a board of special inquiry? Section 16 provides that a written record of the evidence taken and considered at the preliminary hearing need not necessarily be made. So, how could one inspector intelligently challenge the other unless he participated in the examination of the alien, when it has not been recorded in writing so that he might read the same? He could not with any degree of certainty read the evidence, otherwise. Both inspectors must agree in a decision favorable to the admission of an alien, i. e., one may act favorably and the other by not challenging impliedly acquiesce in the favorable decision; provided the Secretary of Labor, in his discretion, has not seen fit to promulgate a rule *increasing* the number of examining inspectors beyond *two*.

It will be noted that Section 17 uses the words "at least" two immigrant inspectors *at the discretion of the Secretary of Labor.* This phrase clearly means, if we may paraphrase it, "not less" than two immigrant inspectors. If the statute read "not more than two" inspectors in the discretion of the Secretary of Labor, it would be very evident that the Secretary could, by rule, confine the examination to one inspector. On the other hand, suppose the statute read "at least two inspectors and not more than *five* inspectors" *at the discretion of the Secretary of Labor.* In that event surely it would not be contended that the Secretary could, by rule, narrow the number down to *one* inspector. Suppose, on the other hand, the statute read "at least *one* inspector" *at the discretion of the Secretary of Labor.* In that event, it cannot be gainsaid that *one* inspector was an absolute minimum and that the words "at the discretion of the Secretary of Labor" simply confided in the Secretary the right to *increase* the number *beyond one.* If it be contended, as evidently it was by the Ninth Circuit Court of Appeals, that the phrase "at the discretion of the Secretary of Labor" applies to the antecedent minimum *one inspector* then the Secretary could abolish the preliminary examination altogether by rule. This would not make sense because the Act clearly states that there must be a "due" holding for a Board of Special Inquiry. This would necessarily contemplate an examination by at least *one* inspector. It is clear that the phrase "at the discretion of the Secretary of Labor", in order to make sense and give effect to

every word of the statute, refers to *increasing* the number of examining inspectors and not *decreasing* the number.

The procedure of exclusion is laid down in Sections 15, 16, and 17 of the Immigration Act of February 5, 1917 (8 USCA 151, 152, 153). Under Sections 15 and 16 it is provided that immigration inspectors shall board all incoming vessels and *inspect* alien immigrants. After the *inspection* they may detain for *examination* any alien whom they *suspect* of being ineligible, and, to that end, order a temporary removal of such alien for *examination* at a designated *time* and *place,* but such temporary removal shall not be considered a landing in the United States for any other purpose. Any alien, who after such a preliminary examination by *at least* two immigrant inspectors at the discretion of the Secretary of Labor, shall not appear to the examining inspectors clearly and beyond a doubt to be eligible for entrance to the United States, shall be held for examination by a Board of Special Inquiry. Section 17 of the Immigration Act of 1917 provides that the Board of Special Inquiry shall have *authority* to determine whether an alien who has been *duly* held shall be allowed to land or shall be deported.

It was not necessary for Congress to include the phrase "at the discretion of the Secretary of Labor" in order to empower him to increase the number beyond two. This is so for the reason that the words "at least" necessarily *imply* that there is no *maximum*

but only a *minimum*. Thus the phrase is really unnecessary. It adds nothing whatsoever to the meaning of the statute. It perhaps was added out of an abundance of precaution. It merely grants, in express language, a discretion to provide for primary inspection by any number of immigrant inspectors in excess of *two* provided the number is not excessive, i. e., that the discretion so confided is not abused.

The words "at least two" mean the same as "two or more" inspectors at the discretion of the Secretary of Labor. If Section 17 of the Immigration Act of 1917 provided that all aliens arriving at ports of the United States shall be examined by "two or more" immigrant inspectors *at the discretion of the Secretary of Labor,* instead of "at least two", no one would contend that the Secretary could, by rule or otherwise, provide for an examination by one inspector. Therefore Rule 3, subd. 1, of July 1, 1925, is void. Also, as supporting the above interpretation, it would preserve the right of one inspector to challenge another.

The interpretation of Section 17 of the Immigration Act of 1917 may be further considered. If the statute had read as follows: "Two immigrant inspectors, the minimum, at the discretion of the Secretary of Labor" it could not be seriously contended that the Secretary could reduce the *minimum*. On the other hand, if the statute read: "Two immigrant inspectors, the maximum, at the discretion of the Secretary of Labor" it would immediately be conceded that the

Secretary could provide for examination by one inspector but not more than two. The preliminary hearing, though *summary,* must afford the alleged alien fair opportunity to establish clearly and beyond a doubt his right to enter the United States.

The Ninth Circuit Court of Appeals seem to concede that if it were not for Rule 3, subd. 1, of July 1, 1925, it would be necessary for *two* immigrant inspectors to conduct the examination of the alien. If this be so then it is immaterial that mention of two inspectors is only made *once* in the statute. If the statute, read as a whole, contemplated only one examining inspector then it would not be necessary for the Secretary of Labor to exercise his discretion. The rule would be surplusage, a false quantity and add nothing to the statute.

The Editors of the Encyclopedia of United States Supreme Court Reports, Volume 11, at pages 119, 120, 121, observe:

> "The legislative meaning is to be extracted from a statute as a whole. Its clauses are not to be segregated; but every part of a statute is to be construed with reference to every other part and every word and phrase in connection with its context, and that construction sought which gives effect to the whole of the statute—its every word, even though ambiguous, unless so clearly repugnant to the rest of the act that the whole cannot stand together. That construction which its different parts inconsistent with and antagonistic to each other is to be avoided. In order to har-

> monize all the different parts of a statute one or all may be qualified, or one may be restrained and another enlarged, or a different meaning given to the same word in different parts of a statute; but a word in a statute used in different parts of a section is to be construed as having the same meaning in both cases. A subordinate part of a statute may be restrained or enlarged to give effect to an important part. If general words are used, which import more than seems to have been within the purview of the other parts of the law, they ought to be restrained. If a section be introduced, which is a stranger to, and unconnected with the other parts of an act, it must nevertheless take effect according to its obvious meaning, independent of all influence from other parts of the law."

It should be remembered that every alien arriving at a port of the United States is entitled as of *right* to be admitted without being held for examination by a Board of Special Inquiry. This appears from a reading of Section 16 of the Immigration Act of 1917 (8 USCA 152), which provides, in part:

> "Said inspectors shall have power to administer oaths and to take and consider evidence touching the *right* of any alien to enter * * * the United States * * * and any person * * *, who shall knowingly or wilfully give false evidence or swear to any false statement in any way affecting or in relation to the *right* of an alien to admission, * * * in the United States shall be deemed guilty of perjury * * * Every alien who may not appear to the examining inspector at the port of

> arrival to be clearly and beyond a doubt *entitled* to land shall be detained for examination in relation thereto by a board of special inquiry * * * The *decision* of an immigrant inspector, if favorable to the *admission* of any alien, shall be subject to challenge by any other immigrant inspector, and such challenge shall operate to take the alien whose *right* to land is so challenged before a board of special inquiry for its investigation." (Emphasis ours.)

It should be noted that the "right" given to the alleged alien is a right which *precedes* a hearing before the Board of Special Inquiry. In other words, the "right" of an alien to admission to the United States is not a right given by the Board of Special Inquiry *for the first time,* but it is a *right* which the alien is mandatorily entitled *before* he reaches a Board of Special Inquiry. It will be observed that the word "right" appears three times and the word "entitled" once in the same section of the statute.

Also, it should not be lost sight of that the statute gives "authority" to the Board of Special Inquiry to examine and investigate the right of an alien to enter the United States *only* when the alien has been previously "duly" held for the Board of Special Inquiry. What does "duly" held mean? It means *legally held.* It necessarily presupposes that certain required legal steps or conditions precedent have been complied with.

Likewise, regarding a preliminary examination before *one* immigrant inspector, it should be remem-

bered that he makes a *decision* before either allowing the alien to land or holding him for a Board of Special Inquiry. His *decision* cannot be based on "suspicion". It must be founded on *evidence.* This necessarily presupposes that some *evidence* must be taken. At least the alien is entitled to offer and present evidence. In the instant case no evidence whatsoever was taken.

The statute says that the alien is *entitled* to land if he can convince the examining inspector clearly and beyond a doubt of his legal right to enter. If this is so the alien is entitled to land without being detained for examination by a Board of Special Inquiry.

How could *one* immigrant inspector *intelligently* challenge the *decision* of another inspector, *who had acted upon evidence,* unless he participated in the examination? Surely the statute does not contemplate (which would be unreasonable) that an inspector can *arbitrarily* challenge the *decision* of another. The right to challenge obviously only relates where there is some basis *in evidence,* not suspicion, for a challenge.

2. Assuming for the purpose of argument only that the Honorable Circuit Court of Appeals are correct in their decision to the effect that a preliminary examination need be held only before, and the alleged alien examined by, *one* immigrant inspector, petitioner respectfully takes issue with the statement of the Honorable Circuit Court of Appeals, that petitioner concedes that a preliminary examination was

conducted by one immigrant inspector. This petitioner did not do. In petitioner's specifications of error filed in the Circuit Court of Appeals, Numbered XIV (R. p. 70), the following is stated:

> "That the court erred in holding that the appellant had been accorded a preliminary hearing before being held for a Board of Special Inquiry."

The briefs filed in the Circuit Court of Appeals show that this contention, namely, that petitioner was not accorded a preliminary examination by *one* immigrant inspector, was argued at length, and that, at no time, did petitioner either concede or admit, expressly or impliedly, that she was accorded a preliminary examination by *one* immigrant inspector, or that her sole contention was that she was not accorded a preliminary examination by *two* immigrant inspectors.

There is not a particle of evidence anywhere in the Transcript of Record, or in any of the exhibits forwarded to this Honorable Court, that she was accorded a preliminary examination by *one* immigrant inspector. The record is silent as to whether or not Section 15 of the Immigration Act of 1917 was followed and notice of the time and place of the preliminary examination given either to petitioner, her alleged father, attorney, or any one else in her behalf. In fact, respondent's return to the writ of habeas corpus shows that petitioner was *inspected* on the vessel by *an* immigrant inspector and after said in-

spection was duly held for examination before a board of special inquiry. The jurisdictional fact of an *examination* is not shown. The Government conceded this fact in their reply brief filed with the Appellate Court and claimed that the statute need not be followed *in the case of those applying for admission as American citizens.* This is mentioned by the Court of Appeals in their opinion in the following language (Tr. of R. p. 80):

> "Appellee contends that this statute applies only to persons seeking admission into the United States as aliens, whereas appellant seeks admission as a citizen."

The preliminary examination by at least two immigrant inspectors is a *condition precedent* to the exercising of any jurisdiction upon the part of the Board of Special Inquiry to *deny* the alien the right to admission to the United States. The "holding" *alone* cannot confer jurisdiction, because, as prescribed by the Immigration Act of 1917, it cannot lawfully be made until *after* the alien has been examined by at least two immigrant inspectors. The "holding" must be a *due* holding. The determination of the examining inspectors would seem to be no less important and jurisdictional than the "holding". Both are initial and essential steps.

It should be particularly noted that the statute says that the Board of Special Inquiry has no power or jurisdiction to determine whether an alien "shall be allowed to land or be deported" *unless* the alien has *first* been *duly* "held." In other words, it is clear

that if the alien has been "admitted and landed" either on the inspection or the preliminary examination, the Board of Special Inquiry has no power to *review* the admission order of the inspectors.

Respondent's return to the petition for the writ of habeas corpus alleges in paragraph II thereof (Tr. of Record, p. 10):

> "That said applicant was upon arrival at the Port of San Francisco, as aforesaid, duly inspected by an immigrant inspector of the United States and was duly detained by said immigrant inspector for examination by a Board of Special Inquiry in relation to the right of said applicant to land in the United States."

Respondent's return to the writ of habeas corpus shows that only *one* immigrant inspector conducted the *inspection* of the appellant. *Inspection* is not a preliminary examination. The return utterly fails to show that a preliminary *examination* was conducted by this, or any other, immigrant inspector. On the other hand, there is not a scintilla of evidence in the record, or any of the exhibits presented for review, to the effect that a preliminary *examination* was accorded to the petitioner before she was "duly" held for examination by a Board of Special Inquiry. No notice of the time and place of hearing in accordance with the express provisions of Section 15 of the Immigration Act was given either to petitioner, her alleged father or her attorney at the port of San Francisco. The so-called "inspection" was merely a delusive formality insofar as the contemplated pre-

liminary examination was concerned. Unless a *hearing* was granted, how could the petitioner show, or attempt to show, that she was indisputably, i. e., "clearly and beyond a doubt entitled to land." An examination of the exhibits in this case will disclose that not even a stereotyped "form" questionnaire was propounded to petitioner. There was not even a semblance of a hearing. Inasmuch as the burden of proof (wrongfully) was upon the petitioner to satisfy the examining inspectors that she was "clearly and beyond a doubt entitled to land" it would seem beyond cavil that she was entitled to an opportunity to introduce whatever proof regarding her status as an American citizen under Section 1993 of the United States Revised Statutes she may have had in order to establish her claim to admission. Certain classes of aliens on arrival at a port of the United States present documents which clearly show, upon identification after comparison of the alien with the photograph attached thereto, that they are entitled to immediate landing, if nothing has arisen to controvert their claim, e. g., laborers' return certificates (Chinese Rule 14, subdivision 11), citizens' return certificates (Chinese Rule 16, subdivision 10), return permits (Chinese Rule 17, subdivision 7) and certificates of residents of Hawaii (Immigration Rule 11, subdivisions B and C, Immigration Rules of January 1, 1930 as amended). Also, the same procedure is followed in the case of so-called "section 6" treaty merchants, wives and minor children of treaty merchants, students, travelers, visitors, government of-

ficials, etc. If their papers are in proper shape and their identity is established they are landed upon *inspection* only. We mention this so that it may clearly be understood that inspection is not *examination.*

The process of exclusion is a new jurisdiction given to executive or administrative agencies, unknown to the common law, and solely created by statute. The statute is the measure and mode of the power. It may be likened to the situation presented when a judicial court acts in a summary manner, or in a new course, different from the common law.

The applicant presented herself, at least, for examination on the issue of paternity. The inspection given the applicant could give a basis for the thought that it was immediately obvious to the boarding inspector that disposition by summary landing could not properly be made. If appellant had been interrogated it might well be that she could have proven her right to enter so indisputably as to place it beyond a doubt. The question cannot be begged by saying that even if she had been interrogated on the issue of paternity, etc., that she could not have satisfied the boarding inspector. The fact is that she was not interrogated. All the immediately foregoing is based upon the assumption (with which we do not agree) that the provisions of Section 15 of the Immigration Act of 1917 regarding the giving of notice of the time and place of the preliminary hearing need not be given. If this procedure had been followed the

appellant would have been given an opportunity to produce her father and other relatives and identifying witnesses and possible documentary evidence in order to corroborate her respecting the issue of paternity and American citizenship.

Of what does the "right" to a primary examination consist? It is the "right" to be landed without further ado. This also implies the right to endeavor to prove or establish clearly and beyond a doubt that the alien is entitled to enter the United States without being held for investigation by a Board of Special Inquiry. The conception of "decision" necessarily carries with it the idea of passing upon evidence.

In connection with Section 15 of the Immigration Act of 1917, it may be apropos to mention that the first clause of said section relating to the removal of the alien for examination *at a designated time and place* is followed by the word "nor" after which certain matters referring to the levying of fines against steamship companies bringing ineligible aliens to the United States is made. "Nor" is a negative particle correlative to the word "neither." It therefore divides the second clause from the first. In other words, the first clause has nothing whatsoever to do with the second clause.

In the case of *Quon Quon Pon vs. Johnson,* 273 U. S. 352, the United States Supreme Court held that a preliminary examination before an immigrant inspector was legal and that a transcript of evidence taken on the preliminary examination was admissible,

as a deposition, and might be considered by the Board of Special Inquiry, after the applicant for admission had been duly held for examination by a Board of Special Inquiry. In this case it appears to be quite apparent that at the Port of Boston this procedure, namely, a preliminary hearing wherein extensive interrogation of witnesses was gone into on the issue of paternity, was followed as being in accordance with the requirements of the Immigration Act of 1917. The Supreme Court of the United States said, in part, in this case:

> "After a preliminary investigation by an inspector, his claim was heard, under the provisions of the Immigration Act of 1917, by a Board of Special Inquiry, which decided, on the evidence, that he was not shown to be the son of Quon Mee Sing, and should be excluded as a Chinese alien not a member of the exempt classes entitled to enter the United States. On an appeal to the Secretary of Labor—this finding having been approved by the Board of Review—the Secretary sustained the decision of the Board of Special Inquiry, and a deportation warrant was issued to the Commissioner of Labor. * * *
>
> "1. The contention that the petitioner was denied a fair hearing as to his citizenship by the Department of Labor, cannot be sustained. The record shows that in September the inspector to whom the case was referred in its preliminary stage, separately examined, under oath and at length, the petitioner, and his alleged father and an alleged brother who offered themselves as witnesses. Their examination, which was by ques-

tion and answer, was taken down and is in the record. It was conducted in an entirely fair and impartial manner. Each of them stated at the conclusion of his examination that he had nothing further to say; and no other witnesses offered themselves or were produced. The petitioner was intelligent, had attended school, and stated that he thoroughly understood the interpreter. At the close of this preliminary investigation the case was immediately referred to the Board of Special Inquiry, consisting of the same inspector, and two others. * * * The contention that the hearing was invalid because the greater part of the testimony was taken before a single inspector and introduced before the Board, is based upon a provision in the same section of the Act that on an appeal from the Board of Special Inquiry the decision shall be rendered 'solely upon the evidence adduced before the Board.' There is, however, no suggestion whatever in the Act that the evidence adduced before the Board of Special Inquiry must be taken in its presence. We see no reason to doubt that evidence properly taken before an inspector, Sec. 16,—which has substantially the same effect as a deposition taken in an ordinary case—may be introduced before the Board and considered by it. See Kwock Jan Fat vs. White, 253 U. S. 454, 458. And here the petitioner offered no objection to the introduction of such testimony, and no application was made to recall the witnesses for re-examination by the Board."

3. The Secretary of Labor, through her Board of Review, added and determined adversely to petitioner

an issuable fact not mentioned, found, or passed upon by the Board of Special Inquiry, or in any way called to the attention of petitioner as an adverse feature, and affirmed the order appealed from partly upon this ground or issue. The Secretary of Labor, through her Board of Review, found that petitioner's vital witness, Whoe Tong, was discredited because of the "fact" that he, a former interpreter in the Immigration Service, had been separated from it for the reason among others that he "had been found guilty of suggesting bribery of an inspector in one or more cases." This violated the rule that a judgment appealed from cannot be *affirmed,* in whole or in part, upon a *factual* ground involving facts not taken at the trial unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error. A violation of this rule is equivalent to condemning the appellant without affording him an opportunity to be heard. In other words it substantially denies an appellant his "day in court"—due process of law (*Peck vs. Heurich,* 167 U. S. 624, 42 L. ed. 302; *Lutcher & M. Lumber Co. vs. Knight,* 217 U. S. 257, 57 L. ed. 757; *Virginia R. Co vs. Mullens,* 271 U. S. 220, 70 L. ed. 915). The United States Supreme Court has repeatedly ruled that this doctrine is applicable to administrative agencies (*General Utilities Co. vs. Helvering,* 296 U. S. 200; *Helvering vs. Gowran,* 302 U. S. 238; *Helvering vs. Salvage,* 297 U. S. 106). A persuasively analogous situation was presented in the case of *Saunders vs. Shaw,* 244 U. S. 317, wherein the Supreme Court held, speaking

through Mr. Justice Holmes, that it is a violation of "due process of law" for an appellate court to reverse a case and render judgment absolute against the party who succeeded in the trial court, upon a proposition of fact which was ruled to be immaterial at the trial and concerning which he had therefore no occasion and proper opportunity to introduce his evidence.

The lower Board of Special Inquiry tried the matter of the credibility and impeachment of petitioner's vital witness, Whoe Tong, on the issue or theory that he was impeached by reason of the claimed fact that he "has repeatedly been guilty of perjury and subornation of perjury in immigration proceedings." The suggestion of bribery was not within the issues, whereas the Secretary of Labor, through her Board of Review, rejected the issue or theory relied upon by the Board of Special Inquiry, and held that this witness was discredited because of his having been found guilty of suggesting a bribe to an immigrant inspector in one or more cases, and ignored looking into the records in an effort to determine whether this witness should have been discredited by the Board of Special Inquiry because of the fact, found by them, that this witness was discredited because of having been "repeatedly guilty of perjury and subornation of perjury in immigration proceedings."

4. The record of Lee Ham Toy, Exhibit "S" (pp. 67, 68), discloses that there was no substantial evidence whatsoever supporting the finding of the Secretary of Labor's Board of Review that petitioner's

witness, Whoe Tong, had been discredited because of his having been found guilty of suggesting the taking of a bribe by an immigrant inspector. The evidence given by this witness, an uncle of petitioner, regarding matters of pedigree tending to prove her American citizenship was vital to her case (R. pp. 24, 25, 33, 34, 35). If the evidence of this vital witness had not been discredited because of there being no substantial evidence upon which to base his claimed impeachment the result may have been entirely different. This rendered the hearing unfair and denied to petitioner due process of law.

5. The Secretary of Labor, through her Board of Review, failed to consider and determine whether the charge and finding of the Board of Special Inquiry that petitioner's vital witness, Whoe Tong, "has repeatedly been guilty of perjury and subornation of perjury in immigration proceedings." The Secretary of Labor, through her Board of Review, abdicated her functions as an appellate agency by refusing to pass upon and determine whether or not the Board of Special Inquiry was correct in this contention. This rendered the hearing on appeal unfair and thereby denied due process of law to petitioner. Section 17 of the Immigration Act of 1917 makes specific provision for review of the decision of the Board of Special Inquiry by appeal for any alleged alien who deemed themselves aggrieved by the action of the lower board. The law is well settled by previous decisions of the Supreme Court and Circuit Court of Appeals that the alien is entitled to a fair hearing before the Secre-

tary of Labor on appeal as well as a fair hearing before the Board of Special Inquiry (*Chin Yow vs. U. S.,* 208 U. S. 8; *Lewis vs. Johnson,* 16 Fed. (2d) 182). It has also been held that the right to appeal from a decision of a lower administrative or executive agency to a higher appellate administrative agency, where the statute so provides, is *jurisdictional.* (*Waldman vs. Tod,* 289 Fed. 761, modified on other grounds in *Tod vs. Waldman,* 266 U. S. 113, 69 L. ed. 195). The right to appeal necessarily implies the right to have all issues reviewed and error, if any, revised. If there was no substantial evidence before the lower Board of Special Inquiry warranting them in rejecting the evidence of this vital witness the hearing before this board was unfair, and appellant was thereby deprived of due process of law before the *lower board.* Appellant was entitled to a finding on this vital issue by the appellate agency either rectifying or recognizing the alleged error. The issue was ignored.

6. The Secretary of Labor, through her Board of Review, made no finding that petitioner was not a citizen of the United States nor that she was an alien ineligible to admission to the United States. Alienage is a jurisdictional prerequisite to the Secretary of Labor ordering deportation. If she is, as she claims, an American citizen the executive authorities have no power to exclude her and order her deportation. As was said in the case of *Ng Fung Ho vs. White,* 259 U. S. 276, 284:

> "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential *jurisdictional* fact." (Emphasis ours.)

As was well and truly said by Chief Justice Taft in the case of *Mahler v. Eby,* 264 U. S. 32, 45:

> "It is said that no exception was taken to the warrant on this account until the filing of the brief of counsel in this Court. There was an averment that the warrant was void without definite reasons in the petition of habeas corpus. There was nothing of this kind in the assignment of error. But we may under our rules notice a plain and serious error though unassigned (citing cases). * * * The character of the defect is such that we cannot relieve ourselves from its consideration. The warrant lacks the finding required by the statute and such a fundamental defect we should notice. *It goes to the existence of the power on which the proceeding rests.*"

The Secretary of Labor's Board of Review, in recommending the dismissal of your petitioner's appeal, stated the following in their opinion (blue sheets):

> "While in the opinion of the Board of Review the citizenship of this applicant's alleged father must be conceded, the claim that she is his daughter has not satisfactorily or reasonably been established by the evidence.
>
> It is recommended that the appeal be dismissed."

If the above portion of the opinion of the Board of Review be considered as a "finding of fact" by the Secretary of Labor herself, it certainly cannot be construed to be a definite finding that your petitioner was either not a citizen of the United States or was an alien ineligible to admission to the United States. This for two reasons, first, she could be a citizen of the United States by virtue of Section 1993 of the Revised Statutes and still not be the daughter of her alleged father, Ngim Lin. In other words, all this could be true and she might be the daughter of some other citizen of the United States, in which event she would be an American citizen. Furthermore, as stated above there is no finding whatsoever that she is an alien ineligible to admission to the United States. In view of the previously cited case of *Mahler v. Eby,* supra; *Tod v. Waldman,* supra; and *Carmado v. Tillinghast,* supra, this lack of specific finding is fatal and the Secretary of Labor's order of deportation is void and a nullity. It would be nothing to the purpose to contend that inasmuch as the Board of Special Inquiry had made definite and sufficient findings in this regard, and we admit they did, that this relieved the Secretary of Labor from making findings. The executive must make the finding.

Dated: August 22, 1940.

Respectfully submitted,

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